AN IER RESPONSE

Protecting whistleblowers seeking jobs in the NHS: Employment Rights Act 1996 (NHS Recruitment – Protected Disclosure Regulations)

Submission to a Department of Health Consultation

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By

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Open consultation: Protecting whistleblowers seeking jobs in the NHS

Employment Rights Act 1996 (NHS Recruitment - Protected Disclosure) Regulations: Consultation on Draft Regulations

INTRODUCTION

The Consultation Paper, *Protecting whistleblowers seeking jobs in the NHS*[1], seeks views on the draft regulations, the Employment Rights Act 1996 (NHS Recruitment - Protected Disclosure) Regulations that aim to provide remedies to those who are denied employment in the NHS after blowing the whistle. The Regulations were drafted to address one of the recommendations of Sir Robert Francis QC in his report, *Freedom to Speak Up – A review of whistleblowing in the NHS*[2]. Francis conducted this review of whistleblowing following his 2013 final report of the Inquiry into high mortality rates and standards of care provided by Mid-Staffordshire NHS Foundation Trust between 2005 and 2009[3]. This 2013 report recorded incidents of workers raising unheeded concerns in Mid-Staffordshire NHS on numerous occasions. It also considered 'openness, transparency and candour' to be the necessary attributes for an organisation and that a culture of openness should allow workers to raise concerns without fear.

As noted by the Consultation Paper, following his Inquiry into Mid-Staffordshire NHS Foundation Trust, Sir Robert Francis QC was asked by the Secretary of State for Health to conduct an independent review of whistleblowing throughout the NHS. He was asked to examine the treatment of staff raising genuine concerns about safety and other matters of public interest, and how those concerns were handled. In his 2015 report, Francis found that the positive experiences of whistleblowers in the NHS formed a small minority and reported that:

> "There were descriptions of what can only be described as a harrowing and isolating process with reprisals including counter allegations, disciplinary action and victimisation."[4]

The Consultation Paper seeks to address Action 20.1 of the *Freedom to Speak Up – A review of whistleblowing in the NHS* which recommends that:

> "The Government should, having regard to the material contained in this report, again review the protection afforded to those who make protected disclosures, with a view to including discrimination in recruitment by employers (other than those to whom the disclosure relates) on grounds of having made that disclosure as a breach of either the Employment Rights Act 1996 or the Equality Act 2010."[5]

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[1] Department of Health, *Open Consultation: Protecting whistleblowers seeking jobs in the NHS*, 2017. Published on 20th March 2017.

[2] Sir Robert Francis QC, *Freedom to Speak Up – a review of whistleblowing in the NHS*, 2015. Published on 11th February 2015.

[3] Report of the Mid-Staffordshire NHS Foundation Trust Public Inquiry, 2013, Volume 1 HC 898-1.

[4] Sir Robert Francis QC, *Freedom to Speak Up – a review of whistleblowing in the NHS*, 2015, Chapter 3 – Evidence from Contributors, p 53.

[5] Sir Robert Francis QC, *Freedom to Speak Up – a review of whistleblowing in the NHS*, 2015, Chapter 9 – Extending legal protection, p 193.

The Employment Rights Act 1996 (NHS Recruitment - Protected Disclosure) Regulations are welcome in their implementation of this recommendation. The Public Interest Disclosure Act 1998 was enacted to protect public interest disclosures by all whistleblowers. It introduced Part IVA into the Employment Rights Act 1996 to provide rights against dismissal and victimisation for making a public interest disclosure. A wide statutory definition of work is set out in the statutory provisions to maximise coverage of the Act. However the 1998 Act did not prohibit the blacklisting of whistleblowers, so an employer is currently free to refuse employment on the grounds that the individual is known to be a whistleblower and the applicant will have no cause of action. Francis was particularly concerned with the lack of blacklisting provisions in the Employment Rights Act 1996 and he regarded this it as "an important omission which should be reviewed, at least in respect of the NHS."[6] The Employment Rights Act 1996 (NHS Recruitment - Protected Disclosure) Regulations[7] will give an individual applying for employment in the NHS the right of complaint to an employment tribunal under Regulation 4, if a NHS employer discriminates against them because it appears to the NHS employer that they previously made a protected disclosure.

In extending the coverage of whistleblowing provisions to prohibit discrimination in this significant area, the Regulations will benefit whistleblowers, if only in the NHS. Blacklisting is an important employment issue. The Institute for Employment Rights have campaigned on the issue of the blacklisting of trade unionists[8] and called for the protection of whistleblowers against blacklisting. In its response to the Government's 2013 consultation, *The* Whistleblowing *Framework: Call for Evidence,* the Institute of Employment Rights called for reform in the area of blacklisting, and highlighted the example of Gary Walker, a former chief executive of the United Lincolnshire Health Trust.[9] His treatment demonstrates the difficulty that an individual can face after raising important concerns in working in their chosen career or profession. Following the publication of the final report of the Mid-Staffordshire NHS Foundation Trust Inquiry, Walker gave an interview to BBC Radio 4 Today programme and revealed that, after settling his case for unfair dismissal for making a protected disclosures, he was unable to work again in the NHS. He stated:

> "So I spent 20 years in the health service and I'm blacklisted from it. I can't work in the health service again"

The case of *Day v Health Education England*[10] also demonstrates the vulnerability of whistleblowers within the Health Service who raise concerns. Day, a junior doctor, raised his concerns with both a NHS Trust and Health Education England about serious staffing issues affecting the safety of patients, but was subjected "to various significant detriments"[11] by Health Education England as a result. The Regulations are therefore a welcome addition to the provisions in the Employment Rights Act 1996 that provide certain employment rights to

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[6] Sir Robert Francis QC, *Freedom to Speak Up – a review of whistleblowing in the NHS*, 2015, Executive Summary, p 21, para 95.

[7] The Regulations are made pursuant to section 49B of the Employment Rights Act 1996 rather than section 49B of the Small Business, Enterprise and Employment Act 2015 as stated in the consultation Paper at page 6 and page 7. This power is provided by Part 5A of the Employment Rights Act 1996 which was introduced by section 149(2) of the Small Business, Enterprise and Employment Act 2015.

[8] See Ewing, *Ruined Lives – Blacklisting in the Construction industry*, A Report for UCATT, 2009.

[9] An IER Response, *The Whistleblowing Framework: Call for Evidence: Submission to the Department for Business, Innovation and Skills*, 2013, authored by Catherine Hobby, in response to question 24.

[10] Day v Health Education England [2017] EWCA Civ 329.

[11] Day v Health Education England [2017] EWCA Civ 329 at para 5.

whistleblowers who raise public interest concerns. The concern with these draft Regulations is that they will only amend the law to protect those seeking employment within the NHS. By restricting the Regulations to the health sector the Government is not respecting the spirit and intention of the Public Interest Disclosure Act 1998.

The development of a culture where workers feel able to raise their concerns through a right not to be blacklisted should be encouraged in all sectors, and not just the NHS. As recognised by Sir Robert Francis QC in his Freedom to Speak Up review:

> "There is a need for a culture in which concerns raised by staff are taken seriously, investigated and addressed by appropriate corrective measures."[12]

The Consultation paper advances several reasons for extending the law only for the NHS. The first is that the health sector "has one of the highest instances of whistleblowing reporting and consequently has the greatest potential" to discriminate against whistleblowers[13]. The other is that as the NHS is one of the largest employers in the world, it "should operate to the very highest standards of integrity in the recruiting process"[14]. This rationale is unconvincing. The NHS is a very large employer, but there are other large employers in many sectors including private health care, finance, retail and energy. The blacklisting of whistleblowers occurs in all areas of employment[15]. Further all prospective employers should operate with integrity in the recruitment of staff and be precluded from discriminating against whistleblowers.

This consultation is also a missed opportunity in only partially addressing one of the 20 Principles identified in the 2015 Francis report. As stated in the Consultation Paper:

> "The overarching intent of the draft regulations is to make clear that discrimination against whistleblowers seeking jobs or posts with certain NHS employers is prohibited"[16]

However, in drafting the Employment Rights Act 1996 (NHS Recruitment - Protected Disclosure) Regulations to just address that one recommendation, the Government fails to engage with the Francis report more broadly for the benefit of all whistleblowers. To facilitate an open culture within the NHS, the report made 20 recommendations that would also be applicable to other organizations, including the appointment of a 'Freedom to Speak Up Guardian' by the organisation's chief executive to act in a genuinely independent capacity to support staff raising concerns in Action 11.1 under Principle 11[17]. It is unfortunate that Government has not endorsed these 20 Principles more widely and consulted on how to implement them.

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[12] Sir Robert Francis QC, *Freedom to Speak Up – a review of whistleblowing in the NHS*, 2015, Letter to Secretary of State for Health, p 6.

[13] Department of Health, *Employment Rights Act 1996 (NHS Recruitment – Protected Disclosure) Regulations: Consultation on Draft Regulations*, p 5.

[14] Department of Health, *Employment Rights Act 1996 (NHS Recruitment – Protected Disclosure) Regulations: Consultation on Draft Regulations*, p 5.

[15] See Public Concern at Work, *Whistleblowing: Time for Change*, a 5 Year Review, 2016, p 17.

[16] Department of Health, *Employment Rights Act 1996 (NHS Recruitment – Protected Disclosure) Regulations: Consultation on Draft Regulations*, p 7.

[17] Sir Robert Francis QC, *Freedom to Speak Up – a review of whistleblowing in the NHS*, 2015, Recommendations, Principles and Actions, p 26.

As shown by the recent reports[18] of the attempts by the Chief Executive of Barclays Bank, Jes Staely, to discover the identity of an employee who anonymously raised concerns, the actions of whistleblowers are not always encouraged and are often punished. Whistleblowers face reprisals from their employers and discrimination by future employers in all areas of employment. The treatment of whisteblowers such as Paul Moore, sacked in 2004 after repeatedly raising concerns regarding regulatory failings at HBOS in his role as Head of Group Regulatory Risk, also demonstrates that such treatment is not isolated to the NHS. Paul Moore was commended a "valuable whistleblower"[19] by Andrew Tyrie, the Chair of the Parliamentary Commission on Banking, when Moore gave oral evidence to the Commission in October 2012. Despite this endorsement Paul Moore has struggled to find employment in the financial sector.

This Response Paper will examine the consultation questions regarding the draft Regulations that will benefit whistleblowers seeking employment in the NHS, but regrets the restriction of the Regulations to the NHS. Wider reform is required in this area and it is unfortunate it has not been undertaken at this time.

Question 1:

Do you agree with the time limit of 3 months in draft regulation 5? Does this present any issues?

The time limit beginning with the date of conduct complained of, as set out in draft Regulation 5 of the Employment Rights Act 1996 (NHS Recruitment - Protected Disclosure) Regulations, provides for equality of treatment. It reflects the time limit of three months set out in section 48(3) of the Employment Rights Act 1996 (ERA 1996) for all complaints under the Act to employment tribunals, including victimisation of workers for making a protected disclosure under section 48(1A). However in a discussion of time limits the issue of employment tribunal fees should be highlighted. An unemployed whistleblower may struggle to find the fee required to make a claim to an employment tribunal. The burden on claimants following the imposition of fees in July 2013[20] is considered later in the response to question 8, but three months may be too brief a time to allow a claimant to find the significant sum now required for whistleblowing claims. Research by the Citizens Advice Bureau has found that just under half of people with an employment issue would have to save for six months to afford the fee of £1,200 required to take a whistleblowing claim to hearing.[21]

It is noted that draft Regulation provides that an employment tribunal may consider a complaint out of time if it is "just and equitable" to do so. However this will not be of assistances to an applicant unable to submit a claim through financial hardship. As found by

[18] The actions of Jes Staely were widely reported in the media including in *The Guardian*, 11th April 2017.
[19] See Parliamentary Commission on Banking Standards, *An accident waiting to happen': The failure of HBOS*, Volume I, Fourth Report of Session 2012-13, 2013, HL Paper 144.
[20] The Employment Tribunals and Employment Appeals Tribunal Fees Order SI 2013/1893.
[21] Citizens Advice Press Release quoted by the Law Society in its discussion document, *Making employment tribunals work for all,* 2015, at p 22, para 88.

the Law Society in its 2015 discussion document, *Making employment tribunals work for all*, the introduction of employment fees "has created a barrier to genuine claimants."[22]

Question 2:

Are there any types of cases that should be mentioned in regulation 5(3), as to the date of conduct for the purposes of calculating the 3 month time limit?

A number of cases are set out in draft Regulation 5(3) of the Employment Rights Act 1996 (NHS Recruitment - Protected Disclosure) Regulations as to how the time limit will be calculated. A number of different circumstances are listed in paragraphs (a) to (f) including actual refusal to employ or appoint an applicant, deliberate omission to entertain or process an application, withdrawal of an offer of a job or post and conduct causing an applicant to withdraw. It may be that a refusal to interview an applicant may fall within a deliberate omission "to entertain and process an applicant's application or enquiry", but the words deliberate omission could preclude a claim if the actions of the NHS cannot be shown to be deliberate. Therefore the express inclusion of a failure to interview should be considered.

Question 3.

Do you agree with the approach taken not to limit the amount of compensation, so that these regulations are comparable with existing whistleblowing claims?

Providing for an employment tribunal to award unlimited compensation is the correct approach as it reflects the uncapped awards provided for other complaints involving protected disclosures. The power to make such awards in respect of the discrimination against whistleblowers during recruitment is necessary to reflect the seriousness of the claim and to act as a deterrent to an employer who may have to pay a substantial payment of compensation for failing to employ an individual on the ground they are perceived as a whistleblower.

Question 4:

Do you agree that the regulations should provide for discrimination to be actionable as a breach of statutory duty?

The provision in draft Regulation 8 of the Employment Rights Act 1996 (NHS Recruitment - Protected Disclosure) Regulations for an applicant to bring a claim for breach of statutory duty in respect of a breach of Regulation 3 to restrain or prevent discriminatory conduct is a useful inclusion. This Regulation would allow a whistleblower to ask the County Court or High Court to intervene to prevent discriminatory conduct rather than seek compensation from an employment tribunal once the discrimination occurs.

Question 5:

Are there are any practical problems arising from regulation 8?

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[22] The Law Society, *Making employment tribunals work for all: Is it time for a single employment jurisdiction?, a discussion document*, 2015, Executive Summary, p 4, para 1.

Draft Regulation 8 should provide a whistleblower with the right to make a claim for breach of statutory duty although it should be recognised that a whistleblower may not wish to work for an employer who has sought to refuse them employment. However the presence of Regulation 8 may deter NHS employers from discriminating against whistleblowers in respect of recruitment.

Question 6:

Do you agree with the proposal that, for the purposes of the regulations, discrimination against an applicant by a worker or agent of an NHS body, should be treated as discrimination by the NHS body itself in the above circumstances – and that the NHS body should have a defence if it can demonstrate it took all reasonable steps to prevent workers and agents from doing what they did or failing to do what they did?

Draft Regulation 9 of the Employment Rights Act 1996 (NHS Recruitment - Protected Disclosure) Regulations, in providing that discrimination by a worker or agent of a NHS employer is to be treated as discrimination by the NHS body itself, is to be welcomed. This extension of vicarious liability to recruitment builds on the inclusion of a duty of vicarious liability in respect of the employment of workers that was introduced into the Employment Rights Act 1996 by the section 19 of the Enterprise and Regulatory Reform Act 2013. The defence set out in Regulations 9 also reflects that provided within section 19. As recognised by the Consultation Paper, such a claim places responsibility on NHS employers to take steps to:

> "develop a culture of openness and an expectation on its workers who are involved in recruitment, to carry out the process in a non-discriminatory way as regards whistleblowers and to ensure that it is not at odds with this legislation."[23]

The provision of a defence, if the NHS body took all reasonable steps to prevent the discrimination, is also an incentive for the NHS to establish a culture of openness, with clear policies and procedures that make it clear the discriminatory treatment for the raising of public interest concerns is not appropriate or condoned. However, as stated earlier, it is unfortunate that this restriction only relates to the health sector.

Question 7:

Do you have any concerns about the impact of any of the proposals on people sharing relevant protected characteristics as listed in the Equality Act 2010? Is there anything more we can do to advance equality of opportunity and to foster good relations between such people and others?

As acknowledged in the Consultation Paper, the 2015 report of Sir Robert Francis QC, *Freedom to Speak Up – a review of whistleblowing in the NHS*, found that women and individuals from a black, minority or ethnic background were "more likely to experience disproportionate detriment in response to speaking up"[24]. The 2015 report found workers of

[23] Department of Health, *Employment Rights Act 1996 (NHS Recruitment – Protected Disclosure) Regulations: Consultation on Draft Regulations*, 2017, p 11.

[24] Department of Health, *Employment Rights Act 1996 (NHS Recruitment – Protected Disclosure) Regulations: Consultation on Draft Regulations*, 2017, p 12-13.

a black, minority or ethnic background were "particularly vulnerable[25]. If the Regulations do "advance equality of opportunity for whistleblowers"[26], if only in the health sector, then this is an additional benefit of the provisions.

However, as noted by the 2015 Francis report, discrimination law does not presently assist whistleblowers as being the "maker" of a public interest disclosure is not one of the protected characteristics in the Equality Act 2010. A change in the scope of the 2010 Act could be made to reflect the approach of the legislation banning the blacklisting of trade union members by according protection to whistleblowers by reference to their status as such rather than a characteristic intrinsic to them as a person. As stated by Francis:

> "As with employment law, any extension of statutory protections under the Equality Act would involve a far wider field of activity than just the health service."[27]

It is also important to recognize in this context that an effective change in discriminatory treatment may not be possible without training backed by effective whistleblowing policies. As highlighted by Francis Robert in his 2015 report, cultural change is required to advance the protection of whistleblowers. In the 20 Principles set out in the report, Robert calls for a culture in which workers can raise concerns as part of the normal routine business of a NHS organisation in Principle 2 and free from bullying outlined in Principle 3. These principles should be supported by a culture of valuing staff considered in Principle 5 and backed by the training of all staff examined in Principle 10. Francis also calls for all NHS organisations to have structures to facilitate both informal and formal raising and resolution of concerns in Principle 7. As discussed above, it is unfortunate that the reforms provided by the Employment Rights Act 1996 (NHS Recruitment - Protected Disclosure) Regulations only engage with Principle 20.1 of the Francis recommendations and fail to adopt a radical and necessary review of the law protecting whistleblowers in all sectors.

It is noted that the Consultation paper commits to a review of the Regulations five years after their implementation[28]. This would be an opportunity to consider the impact of the Regulations in general. Although it should be noted again here that the proposed Regulations fail to advance equality of opportunity as they do not apply to all whistleblowers.

Question 8:

Do you have any concerns about the impact of any of the proposals may have on families and relationships? Impact on business

The stress suffered by whistleblowers as a result of their detrimental treatment for making a public interest disclosure will impact on their families. A loss of income or denial of the career prospects of a whistleblower will affect relationships and family life. As stated in the Consultation Paper, the protection offered by the Regulations may "mitigate any fear or

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[25] Sir Robert Francis QC, *Freedom to Speak Up – a review of whistleblowing in the NHS*, 2015, Executive Summary, p 10, para 19.

[26] Department of Health, *Employment Rights Act 1996 (NHS Recruitment – Protected Disclosure) Regulations: Consultation on Draft Regulations*, 2017, p 12.

[27] Sir Robert Francis QC, *Freedom to Speak Up – a review of whistleblowing in the NHS*, 2015, Executive Summary, Chapter 9 – Extending legal protection, p 191, para 9.14.

[28] Department of Health, *Employment Rights Act 1996 (NHS Recruitment – Protected Disclosure) Regulations: Consultation on Draft Regulations*, 2017, p 13.

anxiety of potential discrimination in recruitment processes."[29] Although it should be recognized that Regulation 4 only provides a right to make a claim to an employment tribunal after discrimination has occurred and does not necessarily prevent the discrimination. As recognized by the Francis report of 2015, the whistleblowing provisions are often described as "protections" but this is not an accurate portrayal for:

> "The legislation does not provide an individual worker with guaranteed protection from suffering detriment if they make a protected disclosure, and contains no measure capable of preventing such detriments occurring. Instead it confers on workers a right not to be subjected to such detriment and gives them a route to obtain remedies if that right is violated. It must be said that those remedies are relatively restricted."[30]

As discussed in relation to question 1, the introduction of fees to bring claims to an employment tribunal in July 2013 has impacted on the ability of claimants to bring cases resulting in a reduction in the number of whistleblowing claims. As highlighted by the 2015 Francis report, this reduction is "significant"[31] as the costs deter claimants, particularly those denied employment on the basis of past whistleblowing. The Law Society recorded that the sum involved in taking a matter to hearing is a "significant amount" for "those on low pay or who have recently lost their job"[32]. This imposition of costs, together with the denial of legal aid, prevents a whistleblower from seeking justice creating stress and impacting on family and relationships. As commented by Cathy James, the Chief Executive of Public Concern at Work, in May 2015:

> "Unable to access legal aid and faced with the financial burden of paying for advice, representation and court fees means that many individuals are effectively being priced out of justice"

Question 7 above asks whether consultees have any concerns about the impact of any of the proposals on people sharing relevant protected characteristics as listed in the Equality Act 2010. The imposition of employment tribunal fees is likely to impact disproportionately on women and individuals of a black, minority or ethnic background. The "steep decline"[33] in the number of cases received by employment tribunals following the introduction of fees has been recorded widely, including a 2015 briefing paper by the House of Commons Library[34], which found an average of a 67% decrease overall. A 50% fall has been noted for all whistleblowing claims of 50%[35]. However the decline is more marked in cases involving sexual discrimination (83%) and equal pay (77%) highlighting equality issues. This impact on the duty to advance equality of opportunity fully has not been acknowledged by the

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[29] Department of Health, *Employment Rights Act 1996 (NHS Recruitment – Protected Disclosure) Regulations: Consultation on Draft Regulations*, 2017, p 14.

[30] Sir Robert Francis QC, *Freedom to Speak Up – a review of whistleblowing in the NHS*, 2015, Chapter 2 – Overview of the legal and policy context, p 40, para 2.2.9.

[31] Sir Robert Francis QC, *Freedom to Speak Up – a review of whistleblowing in the NHS*, 2015, Chapter 2 – Overview of the legal and policy context, p 40, para 2.2.9.

[32] The Law Society, *Making employment tribunals work for all: Is it time for a single employment jurisdiction*?, a discussion document, 2015, p 22, para 89.

[33] House of Commons Library, *Briefing Paper: Employment tribunals fees*, 2015, Number 7081, by Doug Pyper and Feargal McGuiness, p 11.

[34] House of Commons Library, *Briefing Paper: Employment tribunals fees*, 2015, Number 7081, by Doug Pyper and Feargal McGuiness.

[35] Based on a comparison of the figures of whistleblowing claims for 2012/13 are compared to 2014/15. See PIDA Statistics, Public Concern at work, accessed at www.pcaw.org.uk.

Government who ignored the issue of fees in its consultation on proposed reforms to employment tribunals released in December 2016[36]. This is strange for it stated its basic reform principles were to make the justice system "just, proportionate and fair"[37]. The Government is currently defending legal action by UNISON challenging the legality of the imposition of fees. It is to be hoped the appeal of UNISON to the Supreme Court is successful for, as stated by the Law Society, the introduction of employment fees

> "has meant that the employment justice system is hard to access for those on an average income, and intimidating to the point of punitive for the poorest workers."[38]

It is unclear exactly what the inclusion of the words "Impact on business" just added to the end of the question refers to, but it is assumed the question is asking whether the proposals will have any impact on business. Indeed in the following paragraph it is stated that Government policy requires a consideration of an impact on business and to put a "cost value on the impact"[39]. This is an odd question as the Regulations seek to promote a culture of openness in the NHS "where the raising of concerns should be welcome and supported because of the consequences for patient safety"[40], rather than the promotion of business interests. Indeed as noted by the Consultation Paper, the defined NHS public bodies covered by the Regulations "are for this purpose not classified as businesses." Further the focus of this response is on the protection of whistleblowers raising public interest concerns, and not the needs of business. Although it should be noted that the promotion of an open culture in which a worker can express concerns regarding such issues as patient safety or financial irregularity will benefit all organisations.

CONCLUSION

As argued above, the blacklisting of whistleblowers not only occurs within the NHS but other sectors as well. This consultation is a missed opportunity to prevent the discrimination of all whistleblowers in seeking employment. The Employment Rights Act 1996 (NHS Recruitment - Protected Disclosure) Regulations should protect all whistleblowers seeking employment and not just within NHS. Blacklisting is a significant area of concern for whistleblowers as it can be damaging economically, and end a career within an industry or profession. In its review in 2016 Public Concern at work found the blacklisting of whistleblowers was "widespread" in the UK across all sectors[41]. By failing to prohibit the blacklisting of all whistleblowers employers outside the NHS can refuse employment to a prospective applicant with a history of whistleblowing and the whistleblower will have no means of redress. Ward LJ recognized in the case of *Woodward v Abbey National plc*[42], that

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[36] Department for Business, Energy and Industrial Strategy and Ministry of Justice, *Reforming the Employment Tribunal System: Taking forward the principles of wider court and tribunal reform in Employment Tribunals and the Employment Appeal Tribunal,* 2016.

[37] Department for Business, Energy and Industrial Strategy and Ministry of Justice, *Reforming the Employment Tribunal System: Taking forward the principles of wider court and tribunal reform in Employment Tribunals and the Employment Appeal Tribunal,* 2016, Foreword and p 8.

[38] The Law Society, *Making employment tribunals work for all: Is it time for a single employment jurisdiction*?, a discussion document, 2015, p 21, para 83.

[39] Department of Health, *Employment Rights Act 1996 (NHS Recruitment – Protected Disclosure) Regulations: Consultation on Draft Regulations*, 2017, p 14.

[40] Department of Health, *Employment Rights Act 1996 (NHS Recruitment – Protected Disclosure) Regulations: Consultation on Draft Regulations*, 2017, p 5.

[41] See Public Concern at Work, *Whistleblowing: Time for Change*, a 5 Year Review, 2016, p 17.

[42] [2006] EWCA 822.

it would be 'palpably absurd and self-evidently capricious' to protect a worker only in respect of retaliatory acts during employment and not afford protection against detrimental treatment after termination of employment.

Further, reform is not just needed to prevent the blacklisting of all whistleblowers. A substantial review of the approach of the Public Interest Disclosure Act 1998 to fully protect all public interest whistleblowing is required, together with the removal of employment tribunal fees for reasons outlined above. The purpose of the Public Interest Disclosure Act 1998 (PIDA) was to encourage workers to inform their employers about wrongdoing internally and protect them if they disclosed such information. The Act has not effectively secured either objective. Public Concern at Work in its report of 2016 *Whistleblowing: Time for change*[43], found that four out of five whistleblowers experience negative final outcomes and a small continuous drop in the number of individuals who say they would raise a concern about serious malpractice. There is a need for a radical overhaul of the whistleblowing provisions for, as noted by Lord Touhig, one of the drafters of the 1998 Act:

> "In its current form, PIDA is dangerous for whistleblowers because people think they have stronger protection under it than they actually do." [44]

As stated in the submission of the Institute of Employment Rights to the Department for Business, Innovation and Skills consultation, *The Whistleblowing Framework: Call for Evidence* in October 2013[45]:

> "A radical reform of the 1998 Act is required to ensure effective safeguards are guaranteed to those who blow the whistle"

This call is supported by *Freedom to Speak Up – A review of whistleblowing in the NHS* report, that formed the impetus for the Employment Rights Act 1996 (NHS Recruitment - Protected Disclosure) Regulations. The report recognized that the legal protection offered whistleblowers should be enhanced and found:

> "the law seeking to protect whistleblowers is cast entirely in an employment context. It proceeds from an assumption that an exception needs to be made to a general requirement to keep the affairs of the employer confidential, rather than acceptance that all those providing a public service have a duty to raise concerns which affect the public interest."[46]

As part of its consultation on a wide range of issues relating to whistleblowing in 2013, the Government claimed in its consultation paper that it:

> "has recognised the importance of whistleblowing in the workplace to raise concerns about wrongdoing and as an effective tool in the fight against fraud, corruption and malpractice."[47]

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[43] Public Concern at Work, *Whistleblowing: Time for change* (review of activities over five years), 2016.
[44] Interview in *The Guardian*, 10th June 2013.
[45] An IER Response, *The Whistleblowing Framework: Call for Evidence: Submission to the Department for Business, Innovation and Skills*, 2013, authored by Catherine Hobby, p 15
[46] Sir Robert Francis QC, *Freedom to Speak Up – a review of whistleblowing in the NHS*, 2015, Chapter 2 – Overview of the legal and policy context, p 49, para 2.7.2.
[47] BIS *Whistleblowing Framework: Call for Evidence*, Government Response, Introduction, p 8.

However despite this consultation in 2013 and the 2015 Francis report, the Government's response to well-founded calls for reform have been limited and weak. Just two reforms were introduced by the subsequent *Small Business, Enterprise and Employment Act 2015*. The first was a duty on regulators to publish information about whistleblowing concerns which is only now being implemented. The second was the enactment of section 149(2) that introduced Part 5A into the Employment Rights Act 1996, allowing the Secretary of State to make regulations protecting employment applicants. These regulations are now the subject of this consultation, but this provision only applies to the Health Service.

As stated above, the Consultation Paper recognises the NHS as one of the largest employers in the world who should operate to the very highest standards of integrity in its recruiting practices, but this is true of other public sector employers and also those within the private sector. All employers should be precluded from discriminating against whistleblowers in their recruitment practices. If whistleblowing is seen as of value in one field to promote a culture of openness in which the raising of concerns is "welcomed and supported", then this perspective should be applied to all areas of employment.[48]

Although the law on whistleblowing was not the main focus of his 2015 report, Francis stated the view that "I do not consider the legal protection is adequate".[49] He considered it was more effective to address the culture in an organisation to improve the handling of concerns so it was not necessary to seek legal redress. This may be a preferable approach, but the law should be consistent and protect individuals equally. Indeed Francis invited the Government "to review the legislation to extend protection to include discrimination by employers in the NHS, if not more widely"[50]. The Employment Rights Act 1996 (NHS Recruitment - Protected Disclosure) Regulations are welcome, but fail to fully advance the rights of whistleblowers by only providing limited relief against discrimination. In only prohibiting the blacklisting, and only within the NHS, the Regulations do not provide the necessary reforms to protect whistleblowers. The current law set out in the Employment Rights Act 1996 is complex and only provides a remedy to those whistleblowers both able to access the rights and afford to take a case to an employment tribunal. It is not an effective protection to all whistleblowers against detriment. Further reform is required as set out in previous responses to consultations on the whistleblowing provisions. As stated in our response to the 2013 consultation:

> "The unique status and benefits of whistleblowing should be acknowledged by effective legal protection for those workers who expose wrongdoing." [51]

[48] Employment Rights Act 1996 (NHS Recruitment – Protected Disclosure) Regulations: Consultation on Draft Regulations, p 5.
[49] Sir Robert Francis QC, *Freedom to Speak Up – a review of whistleblowing in the NHS*, 2015, Executive Summary, p 21, para 93.
[50] Sir Robert Francis QC, *Freedom to Speak Up – a review of whistleblowing in the NHS*, 2015, Executive Summary, p 21, para 95.
[51] An IER Response, *The Whistleblowing Framework: Call for Evidence: Submission to the Department for Business, Innovation and Skills*, 2013, authored by Catherine Hobby, Introduction.